can be considered at all. In this matter I follow the example of Lord Hobhouse in the case of *Slattery* v. *Naylor, supra,* to which I have already referred. Therefore, on all these grounds I consider that the decision of the learned Magistrate should be upheld, and that this appeal should be dismissed.

Appeal dismissed.

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[199] **VALLIPURAM SIVAGURU v. PALANIAPPA CHETTY**

[O. C. J. (Aitken J.) May 30, 1936]
[Negri Sembilan Civil Suit No. 2 of 1936]

The Land Code (Cap. 138), ss.85 and 134 — Unregistered transfer — Contractual rights.

In 1931 *G.* deposited his issue document of title to land with the first defendant as security for a loan and in 1932 sold the same land to *N.* explaining the absence of the issue document of title by a false statement that it was lost. On account of the absence of the issue document of title *N.* could not obtain registration of the transfer on sale and in consequence lodged a caveat against the land. *G.* died in 1932, shortly after executing the transfer in favour of *N.*, and in 1933 the first defendant also lodged a caveat claiming a lien by deposit with him of the issue document of title. At the end of 1933, *N.* executed a transfer of his land in favour of the plaintiff and *N.* died in June, 1934. In August, 1934, this land was transmitted to the second defendant as administrator of *G.'s* estate.

In an action by the plaintiff claiming to be registered as proprietor of this land —

Held: that section 85 of the Land Code (Cap. 138) prevented registration of the memoranda of transfer from *G.* to *N.* and from *N.* to the plaintiff.

Held further: that *N.* could not have obtained a decree for specific performance against *G.* so long as the issue document of title remained deposited with the first defendant and therefore the plaintiff could not obtain a decree directing the second defendant to transfer the land to him unencumbered by the lien.

E. Jeff for the plaintiff.

W. G. W. Hastings for the first defendant.

Second defendant absent.

Cur. Adv. Vult.

Aitken J.: There is no dispute about the facts of this case, which arises out of the somewhat disingenuous conduct of one Gan Inn, since deceased, in relation to a plot of land in the Mukim of Ayer Kuning known as Lot No. 297 and held under Negri Sembilan Grant No. 11347. In January, 1931, he deposited the issue document of title to this land with Palaniappa Chettiar, the first defendant, as security for a loan of $1,130 with interest thereon due under a promissory note dated the 19th of January, 1931, and then he sold and purported to transfer the same plot of land to one Nagappar Eliathamby, through whom the plaintiff claims, on the 17th of March, 1932, apparently explaining the absence of the issue document of title by a false statement to the effect that it was lost. Nagappar Eliathamby could not obtain registration of the memorandum of transfer because neither he nor Gan Inn could produce the issue document of title, and there is no sufficient evidence to prove that he ever presented the same for registration to the Registrar of Titles for Negri Sembilan. He did, however, on the 21st of March, 1932, lodge a caveat in the prescribed form against any transfer, charge or lease by Gan Inn with the Registrar of Titles for Negri Sembilan who duly registered the same; and in this caveat, which is dated the 19th of March, 1932, the registrable interest in the land which he was then claiming is stated as follows:—

> "An interest by virtue of a lien created in my favour by an instrument of transfer executed on the 17th day of March, 1932 by the owner thereof, for consideration paid to him in the land held under Grant No. 11347, Lot No. 297 Ayer Kuning Mukim."

The next date of importance is the 22nd of August, 1933, when Palaniappa Chettiar, the first defendant, lodged a caveat in the prescribed form against any transfer, charge or lease by Gan Inn with the Registrar of Titles for Negri Sembilan who proceeded to register the same, being apparently unaware that Gan Inn was dead. In that caveat, which is dated the 21st of August, 1933, the registrable interest in the land which the first defendant was then claiming is stated as follows:—

> "A lien by the virtue of the deposit with me by the owner of his title as security for the payment of a sum of $1,130 and interest thereon at 24 per cent. per annum due on a promissory note dated 19th January, 1931, in the land held under Grant No. 11347 for Lot No. 297."

There can be no doubt that, in view of the provisions of section 155 of the Land Code, the Registrar of Titles for Negri Sembilan acted in contravention of the law when he registered this caveat, and I am afraid that his error in that respect may give rise to considerable difficulties in the future which do not concern me now.

I see no good reason to suppose that Nagappar Eliathamby ever became aware of this caveat lodged by the first defendant, but he must be presumed to have known that he could not become the registered proprietor of this lot of land unless he could either "find" the original issue document of title or obtain a certified copy of it under section 100 of the Land Code. We do not know whether he took any steps in either direction, but we do know that on the 8th of December, 1933, he sold and purported to transfer the land to the plaintiff, who admittedly acted *bona fide* in the matter, on the footing that the original issue document of title was lost and that the plaintiff had his authority to make any application that might be necessary to enable him to become the registered proprietor. About six months later, on the 15th of June, 1934, Nagappar Eliathamby died; and on the 14th of August, 1934, this lot [200] of land was [200] transmitted to the second defendant in his dual capacity of official administrator and personal representative of the late Gan Inn deceased. There was no further change in the position until the 30th of December, 1935, when the first defendant commenced an action against the official administrator in his capacity of administrator of the estate of the late Gan Inn claiming payment of the amount then due in respect of capital and interest under the promissory note of the 19th of January, 1931, and praying for an order for the sale of this lot of land over which he alleged that he had created a lien. The proceedings in that action seem to have come to the notice of the plaintiff

within a very short time after its commencement, for we find him filing his plaint in this action on the 17th of January, 1936, and lodging a caveat with the Registrar of Titles three days later. I gather that those proceedings have been stayed by mutual consent pending the determination of this action, and before I proceed to deal with the issues of law which are raised in this action it may be helpful if I tabulate, as concisely as possible and in chronological order, the admitted facts out of which they arise.

January 19, 1931: Gan Inn executes the promissory note in favour of the first defendant, and deposits the issue document of title to Lot No. 297 in the Mukim of Ayer Kuning with the first defendant as security for repayment of loan and interest.

March 17th, 1932: Gan Inn sells and purports to transfer Lot No. 297 to Nagappar Eliathamby.

March 21st, 1932: Nagappar Eliathamby lodges a caveat which is registered on the same day.

April 6th, 1932: Gan Inn dies.

August 22nd, 1933: Palaniappa Chettiar, the first defendant lodges a caveat which is registered the same day.

December 8th, 1933: Nagappar Eliathamby sells and purports to transfer Lot No. 297 to Vallipuram Sivaguru the plaintiff.

June 15th, 1934: Nagappar Eliathamby dies, and no personal representative of his estate has yet been appointed.

August 14th, 1934: Lot No. 297 is transmitted to the official administrator as the administrator of the estate of the late Gan Inn deceased.

December 30th, 1935: Palaniappa Chettiar, the first defendant commences his action against the official administrator in his capacity of administrator of the estate of the late Gan Inn deceased.

January 20th, 1936: Vallipuram Sivaguru lodges a caveat which is registered on the same day.

This completes my examination of the facts of the case which, as has been already remarked, are not in dispute.

In his plaint or statement of claim the plaintiff, after setting out these facts in a concise form, claimed that the first defendant had no lien over the land and that he, the plaintiff, was entitled to be registered as the owner thereof free from encumbrances. He prayed judgment for:—

"1. A declaration that the plaintiff is entitled to be registered as the proprietor free from encumbrances of the land comprised in Negri Sembilan Grant No. 11347.

2. An order that the Registrar of Titles, Negri Sembilan, do register the plaintiff as such proprietor.

3. Such further or other relief as justice may require.

4. Costs."

The first defendant in his statement of defence did not deny any of the facts set out in the plaint, though he pleaded (1) that the unregistered Memoranda of Transfer Gan Inn to Nagappar Eliathamby of March 17th, 1932, and Nagappar Eliathamby to the plaintiff of December 8th, 1933, did not constitute sales and transfers of the land, and (2) that if they did the sale and transfer to the plaintiff was subject to his (the first defendant's) caveat of August 22nd, 1933. He further averred that the plaintiff's interest in the land, if any, was both subsequent and subject to his (the first defendant's) caveatable interest in the same, and contended that the plaint disclosed no title in the plaintiff which could enable him to sue in respect of the land. After a final plea that no contractual relationship existed between the plaintiff and the second defendant, the statement of defence of the first defendant prayed that the plaintiff's action should be dismissed, with costs. The second defendant neither filed a statement of defence nor appeared at the trial: he may therefore be regarded as strictly neutral.

The action came on for hearing on the 26th of May, 1936, in the presence of Mr. Jeff for the plaintiff and Mr. Hastings for the first defendant, and as the argument progressed it became obvious that the plaintiff could not succeed on his claim for a declaration that he was entitled to be registered as the proprietor of the land, quite apart from the questions raised as to the first defendant's lien. As I understand the position with regard to lands in the Federated Malay States it is this: — Registration under the Land Code is the foundation of title in every case, and there can be no title to land apart from that given by the Register. Thus, unless the plaintiff can get upon the Register by virtue of the two memoranda of transfer of title Gan Inn to [201] Nagappar Eliathamby and Nagappar Eliathamby to himself, he cannot possibly obtain the declaration he claims; and in the circumstances of this case section 85(ii) of the Land Code is a fatal bar to the plaintiff's hopes in that direction. Section 85(ii) reads as follows:— [201]

"The death of any person prior to the presentation of any instrument executed by him shall prevail so as to prohibit the registration of such instrument, and such instrument if registered shall be void."

It was conceded or admitted that neither of these memoranda of transfer has ever been presented for registration as required by sections 74, 75 and 76 of the Land Code, and both Gan Inn and Nagappar Eliathamby are now dead. It follows, therefore, and quite apart from the other obstacles in the plaintiff's path, that the registration of both the memoranda of transfer on which the plaintiff relies is prohibited by this section 85(ii), and I have already pointed out in the Federated Malay States no one can acquire any title to any land unless he can get upon the register.

So far the case presents little difficulty, but when Mr. Jeff found the ground on which he was standing had become unsafe he sought to change to another. In his reply to Mr. Hastings' argument he asked me to amend the proceedings by adding to the plaint an alternative prayer for an order upon the second defendant, in his capacity of official administrator and administrator of the estate of the late Gan Inn, deceased, directing him to transfer the land in question to the plaintiff unencumbered by any lien. Mr. Hastings not unnaturally opposed any such amendment arguing that if I allowed it, I should be converting the original suit into a suit of another and inconsistent charatcer contrary to the proviso to section 45(i) of the Civil Procedure Code. According to him the wide and general power to amend given by section 598 of the Code, on which Mr. Jeff relied, is governed and circumscribed by the clear cut provision of that proviso. Eventually, after considerable discussion, counsel agreed that I should deal with the question whether or no the proposed amendment should be made in my judgment, and I then heard argument by

both counsel on the footing that it had been allowed without prejudice to Mr. Hastings' objection that I neither could nor should allow it.

I will deal with the question as to whether the proposed amendment should be allowed first. In that connection it is to be observed, once again, that there is no dispute about the facts of this case, which the plaintiff has put honestly and fully before the Court. What has happened is that by inadvertence the relief asked for in the plaint does not enable the Court to try the whole case on the merits, and therefore, following a decision of the Privy Council on the corresponding provisions of the Indian Civil Procedure Code, I have come to the conclusion that an opportunity should be afforded, by the allowance of the proposed amendment, for a decision upon the real points of law that are in dispute. Since Mr. Hastings found no difficulty in meeting the arguments put forward by Mr. Jeff in support of the alternative relief claimed by his amendment, I feel reasonably confident that I am doing no injustice to the first defendant by allowing it, and that the second defendant, if present, would have raised no objection. I should, perhaps, add that in my opinion this amendment of the relief sought does not involve such a change in the suit as to convert it into a suit of another and inconsistent character. It is also to be recorded that, on my suggestion, both counsel agreed to the substitution of "The Official Administrator in his capacity of Administrator of the Estate of the late Gan Inn deceased" for "Adolphe Charles Jomaron" as the second defendant to the action.

The way is now clear to an examination of the points of law raised by Mr. Jeff's alternative claim to relief, that is his claim for an order upon the official administrator directing him to transfer the land in question to the plaintiff free from any encumbrances. His argument in support of that claim may be summarised as follows: — The Land Code is to be construed as merely depriving an unregistered instrument of any operation as a transfer or incumbrance, and does not interfere with its operation as a contract — *Haji Abdul Rahman* v. *Mohammed Hassan,* [1917] App. Cas. 209, and *Loke Yew* v. *Port Swettenham Rubber Co.,* [1919] App. Cas. 491. All contractual rights created by any such instrument are to be treated as assignable rights, — *Loke Yew* v. *Port Swettenham Rubber Co., ubi supra,* and *Howard* v. *Miller,* [1915] App. Cas. 318. In this case the memorandum of transfer executed by Gan Inn and Nagappar Eliathamby on March 17, 1932, conferred a right upon the latter to sue Gan Inn for specific performance of the contract thereby made between them for the sale and transfer of the land in question to Nagappar Eliathamby. That contract also provided a sufficient foundation for a caveat which Nagappar Eliathamby lodged on March 21st, 1931; and the benefit thereof, and of the said caveat, were assigned to the plaintiff by virtue of the memorandum of transfer executed by Nagappar Eliathamby and the plaintiff on December 8th, 1933. In this way the plaintiff has become entitled to sue the official administrator, in his capacity of personal representative of the late Gan Inn deceased, for specific performance of the contract of March 17th, 1932; and since the latter is now the registered proprietor of the land in question and the first defendant's caveat [202] is either void or postponed to Nagappar Eliathamby's caveat, the plaintiff is entitled to an order upon the second defendant to transfer the land to him. When I asked Mr. Jeff how the second defendant could carry out such an order though he has not got the issue document of title to the land, he referred me to the powers of the Registrar of Titles under section 230 of the Land Code, and suggested also that I could make an order upon the first defendant to deliver up that document of title so that effect could be given to an order upon the second defendant to transfer. [202]

Now I see no great difficulty in the way of regarding the memorandum of transfer of March 17th, 1932, as a contract for the sale of the land in question to Nagappar Eliathamby; nor do I see any insuperable difficulty in the way of treating the memorandum of transfer of December 8th, 1933, as an equitable assignment to the plaintiff of the rights conferred by that contract on Nagappar Eliathamby; but it is perfectly obvious that Nagappar Eliathamby could only assign to the plaintiff that to which he himself was entitled under the contract. What, then, was he entitled to thereunder? According to Mr. Jeff he was entitled to obtain a decree against Gan Inn for specific performance of the contract to transfer the land in question, and this assumption is, to my mind, a fatal at the very threshold of Mr. Jeff's argument because I hold, without any hesitation, that Nagappar Eliathamby could not have obtained any such decree for specific performance against Gan Inn so long as the issue document of title remained deposited with the first defendant. To hold otherwise would be to ignore the provisions of the Land Code as to registration and the necessity for the production of such issue document of title to the proper registering authority. Mr. Jeff suggested that either the Court, or the proper registering authority, would have compelled the first defendant to produce and hand over the issue document of title so that a transfer could have been registered. I cannot agree. By the deposit with him of the issue document of title the first defendant acquired a right to present a caveat and so create a lien, and in my opinion that was a valuable right of which he could not be deprived against his will by any Court or Registrar of Titles, so long as the loan in respect of which the deposit was made remained unpaid. Specific performance is an equitable remedy, and any one seeking a decree for the same must show that he is entitled thereto in equity. There is, however, no equitable principle by virtue of which a right in regard to land can be taken away from the true owner, under colour of specific performance of a contract to which he was in no sense of the word a party — *Howard* v. *Miller, ubi supra.*

For these reasons I am of opinion that the plaintiff's action fails in all respects as against both defendants and must be dismissed with costs. In the case of the second defendant, as I am given to understand that he has incurred no costs he will therefore

not be entitled to any. I am also greatly indebted to both learned counsel for the wealth of authority to which they directed my attention during the hearing. In my view that I have taken it is unnecessary for me to deal with any of them, but since I have spent several hours in studying them I propose to hazard two *obiter dicta*. The first is that cases in regard to the nature of a lien decided under section 80 of the Registration of Titles Enactment, 1911, afford no safe guidance to the construction of section 134 of the Land Code which contains the present law on the subject. The second is that Privy Council decisions on systems of Land Registration in force in other British Possessions, Colonies and Dominions, and even on Enactments formerly in force in Federated Malay States, are not always applicable to the provisions of our present Land Code. For example, at p. 116 of *Hogg* on Registration of Title to Land throughout the Empire the following passage occurs in reference to the Federated Malay States on which Mr. Jeff placed special reliance:—

"In the Federated Malay States there is a stringent enactment making transactions by non-statutory methods 'null and void and of no effect'. (F.M.S. 1911, section 5). This is to be construed as merely depriving the unregistered instrument of any operation as a transfer or incumbrance, and does not interfere with its operation as a contract [*Haji Abdul Rahman* v. *Mohamed Hassan, supra,* and *Loke Yew* v. *Port Swettenham Rubber Co., supra*]. The right to be registered conferred by such an instrument is to be treated as an assignable right of property thus placing such a right higher than a mere contract [*Loke Yew* v. *Port Swettenham Rubber Co., supra,* and *Howard* v. *Miller, supra*]."

This last sentence about the right to be registered being treated as an assignable right of property does not seem to me to be applicable to either of the unregistered memoranda of transfer in this case: see in particular section 85(ii) of the Land Code.

Action dismissed.

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[203] JOHORE REPORTS

QUAH HONG LIAN NEO v. SEOW TEONG TECK & ORS.

[O.C.J. (Mills J.) April 25, 1936]
[Johore Civil Suit No. 4 of 1935]

Land Enactment, 1910, Part V — Forged transfer — Bona fide registered chargee for value from registered transferee.

The original plaintiff, Tan Keng Neo was the executrix and devisee in trust of Seow Eng Tin deceased and, as such, was registered as proprietor as representative of the lands comprised in Johore Grants 12364 and 12365. The 1st defendant obtained possession of the titles by a trick. He procured a woman to impersonate Tan Keng Neo and to execute a forged transfer of the lands to himself. Immediately thereafter he, purporting to act as registered proprietor, executed a first charge in favour of the 2nd defendant to secure advances on current account. Thereafter this transfer and first charge were registered. Subsequently the 1st defendant executed a second charge to the 2nd defendant to secure further advances, and this charge also was registered. Subsequently the 1st defendant executed a third charge to the 3rd defendant to secure advances on current account. Thereafter this transfer and first charge were registered. Subsequently the 1st defendant executed a third charge to the 3rd defendant to secure advances on current account. This also was registered.

The 1st defendant absconded.

The 2nd defendant proved that he had given value for his charge *bona fide* and without notice of the fraud.

The 3rd defendant did not prove that he had given value for his charge *bona fide* and without notice of the fraud.

Possession of the property remained with the original plaintiff.

Neither the plaintiff nor the 2nd or 3rd defendant was negligent.

The original plaintiff, having discovered the frauds, brought suit claiming *inter alia* to have the forged transfer and the three charges declared void as against her and set aside and to have the register rectified. She died during the hearing, and the suit was carried on by her successor, the substituted plaintiff.

Held: the plaintiff was entitled to succeed.

(1) The "fraud," referred to in the concluding clause of section 59 of the Land Enactment, 1910, against which the Court has jurisdiction to relieve is not confined (as it is in section 90H.) to fraud to which the purchaser is proved to be a party.

(2) The forged transfer to the 1st defendant was a nullity. *Gibbs* v. *Messer*, [1891] App. Cas. 257 followed.

(3) As the 1st defendant obtained no rights by virtue of the forged transfer, he had no rights, by reason of the maxim *Nemo dat quod non habet*, to hand on to the chargees. Therefore the charges were nullities, at any rate so far as they affected the land supposed to be charged.

(4) On a true construction of section 59 of the Land Enactment, the land did not pass to the chargor, notwithstanding the registration of the forged transfer. That transfer, being a forgery, was not an "instrument" and no title under section 59 could arise out of it.

(5) If, however, the land did pass under section 59, the Court, in exercising its jurisdiction in fraud, ought to prefer the equity of the plaintiff, as being prior in time, to the equities of the 2nd and 3rd defendants.

(6) The 2nd and 3rd defendants could not rely on the legal estate because, even if it be assumed that registration of the charges was equivalent to getting in the legal estate in unregistered land, the chargor here had no title and, in such a case, the legal estate would only afford protection if clothed with possession.

(7) A grant in Johore does not confer an indefeasible title on the grantee.

(8) It depends on the terms of the Enactment how far the Legislature intends that people shall be able to rely on the Register. The Johore Enactment is not modelled closely on the Australian Torrens Acts and substantially differs from them. In particular, except in the case of Court sales under section 83 and section 90H, the Enactment contains no provision conferrig idefeasibility of title or State warranty of title.

TRIAL OF ACTION.

The further facts appear from the judgment.

K. K. O'Connor for the plaintiff.

The transfer to the 1st defendant was a forgery. Forgery (except in cases where the plaintiff is estopped from averring the forgery) is a nullity and passes nothing. The plaintiff can say *non est factum*. [*Cooper* v. *Vesey*, 20 Ch. D. 611 (C.A.)]. Therefore the 1st defendant got nothing under the transfer, and his registration as proprietor could, and would have been set aside at the suit of the plaintiff. Apart from any title which the register might enable him to confer, he could confer no title. *Nemo dat quod non habet.*

The main question is: — Did the fact that the 1st defendant became registered as proprietor, although the transfer to him was forged, enable him to make charges to the 2nd and 3rd defendants which would be valid as soon as registered by them? In other words, does a *bona-fide* transferee or chargee for value, taking from